Supreme Court, U. S.
FILED
JAN 19 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO. 75-1079

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF ELIZABETH J. BROOKS, DECEASED:

LUCY ELIZABETH BROOKS SCHANEFELT,
APPELLANT

v.

JOSEPH R. PARADISO,
APPELLEE

APPEAL FROM THE SUPREME COURT OF NEW MEXICO

JURISDICTIONAL STATEMENT

WARREN F. REYNOLDS, ATTORNEY FOR APPELLANT, LUCY ELIZABETH BROOKS SCHANEFELT

Post Office Box 638
Hobbs, New Mexico 88240

L. GEORGE SCHUBERT, ATTORNEY FOR APPELLEE, JOSEPH R. PARADISO

Post Office Box 796
Hobbs, New Mexico 88240

INDEX

PAGE

OPINION BELOW.....1

JURISDICTION.....2-4

NEW MEXICO STATUTE INVOLVED.....4

QUESTION PRESENTED.....4-5

STATEMENT OF THE CASE.....5-10

THE QUESTION IS SUBSTANTIAL.....10-12

CONCLUSION.....12

TABLE OF AUTHORITIES CITED

CASES

Coleman v. Miller (1939),
307 U.S. 433, 83 L.Ed. 1385.....4

Fiske v. Kansas (1927),
274 U.S. 380, 71 L.Ed. 1108.....4

Frontiero v. Richardson (1974),
411 U.S. 677, 36 L.Ed. 2d 583,
93 S.Ct. 1764.....11

Stanley v. Illinois (1972),
405 U.S. 645, 31 L.Ed. 2d 551,
92 S.Ct. 1208.....12

PAGE

UNITED STATES CONSTITUTION

Fourteenth Amendment.....3,5,9,11,12

STATUTES

28 U.S.C.

§1257(2).....3

NEW MEXICO STATUTES

53 N.M.S.A.

Sec. 29-1-15.....2,3,4,5,7,8,9,10

Sec. 29-1-22.....8

Laws of 1927, Chapter 163,
Section 1.....9

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF ELIZABETH J. BROOKS, DECEASED:

LUCY ELIZABETH BROOKS SCHANEFELT,
APPELLANT

v.

JOSEPH R. PARADISO,
APPELLEE

APPEAL FROM THE SUPREME COURT OF NEW MEXICO

JURISDICTIONAL STATEMENT

OPINION BELOW

The appellant is appealing from an unreported decision of the Supreme Court of New Mexico, affirming the order of the lower court dismissing appellant's Petition to set aside the will of the decedent herein. A copy of the decision is included in the appendix herein.

JURISDICTION

This cause was filed in Probate Court in Lea County, New Mexico by appellee seeking to have a will naming him sole beneficiary and executor admitted to probate. Later this cause was removed to District Court of Lea County, New Mexico where the district court entered its order admitting the will to probate.

Appellant filed a petition to set aside the will with appellee responding by moving to dismiss the petition on the ground that appellant was not an heir under 53 N.M.S.A., Sec. 29-1-15. Sec. 29-1-15 provides for inheritance by heirs of a predeceased wife if the deceased husband has no heirs. Appellant was the heir of a predeceased husband whose wife died without heirs. Appellant argued in

district court that if Sec. 29-1-15 did not apply to her it was unconstitutional under the Fourteenth Amendment of the Constitution of the United States.

Final judgment of the District Court granting appellee's motion to dismiss appellant's petition was entered on November 14, 1974 and is included in the appendix herein. Appellant filed a timely appeal to the Supreme Court of New Mexico. Final Judgment of the Supreme Court of New Mexico was entered on October 21, 1975. Appellant's notice of appeal was filed in the New Mexico Supreme Court on January 16, 19[illegible]. a copy of which is included in the appendix.

The jurisdiction of the Supreme Court of the United States for this direct appeal is granted by 28 U.S.C. Sec. 1257(2). The following cases are believed to sustain the jurisdiction of

the supreme court to review the decision of the Supreme Court of New Mexico on direct appeal in this cause. Fiske v. Kansas, 274 U.S. 380, 71 L.Ed. 1108 (1927); Coleman v. Miller, 307 U.S. 433, 83 L.Ed. 1385 (1939).

NEW MEXICO STATUTE INVOLVED

The New Mexico Statute whose constitutionality is being questioned reads as follows:

> Inheritance by heirs of wife. --If heirs are not thus found the portion uninherited shall go to the heirs of the wife of the intestate, if dead, according to like rules, and if he has more than one [1] wife, who died, it shall be equally divided between the heirs of all such wives, taking by right of representation. 53 N.M.S.A., Sec. 29-1-15

QUESTION PRESENTED

The question presented by the appeal is whether

Equal protection of the laws provided by the Fourteenth Amendment to the Constitution of the United States requires application of 53 N.M.S.A., Sec. 29-1-15 to heirs of deceased husbands as well as to heirs of deceased wives.

STATEMENT OF THE CASE

Briefly the facts are that appellee filed a Petition for Probate of Will in the Probate Court of Lea County alleging that he had in his possession an instrument purporting to be the Last Will and Testament of Elizabeth J. Brooks, deceased. He further alleged that "...the decedent had no relatives by consanguinity..." and that he was named in the will "...as her sole devisee and legatee..." He prayed that the will be admitted to probate and he be appointed as executor as designated in the will. (Tr. 1)

As an opponent to the admission of the will, the State of New Mexico filed a motion to transfer the proceedings to the District Court of Lea County, which motion was granted. (Tr. 4, 5) On April 15, 1974, the district court rendered its judgment admitting the will to probate and appointed appellee as executor. (Tr. 7)

On September 9, 1974, appellant filed a petition challenging the validity of the Last Will and Testament of the decedent. Appellee then filed a motion to dismiss the petition, alleging appellant was not an heir and not entitled to challenge the will. (Tr. 8, 9)

Appellant filed an amended petition alleging two additional persons as heirs of the deceased. (Tr. 10-14) Further, appellant alleged that she was the

daughter of the brother of decedent's only husband, Frank J. Brooks, who predeceased the decedent. Since decedent died with no heirs by consanguinity, appellant, her brother, Perry Hershey Brooks, and her nephew, Frederick Harrison Brooks, the only living relatives by consanguinity to Frank J. Brooks, are heirs of the deceased under 53 N.M.S.A., Sec. 29-1-15. (Tr. 11-13) An affidavit was filed that recited facts to establish these allegations. (Tr. 15)

Appellee in support of his motion to dismiss the petition urged that 53 N.M.S.A., Sec. 29-1-15, which was in force at the time of the decedent's death, only applied to inheritance by heirs of a predeceased wife and not to heirs of a predeceased husband. At the time of the decedent's death on March 27,

1973, Sec. 29-1-15 read as follows:

> Inheritance by heirs of wife. --If heirs are not thus found the portion uninherited shall go to the heirs of the wife of the intestate, if dead, according to like rules, and if he has had more than one [1] wife, who died, it shall be equally divided between the heirs of all such wives, taking by right of representation. (Tr. 30)

Appellant in rebuttal urged two propositions. First that 53 N.M.S.A., Sec. 29-1-15 also applied to inheritance by heirs of a predeceased husband by direction of 53 N.M.S.A., Sec. 29-1-22 which reads as follows:

> Provisions concerning widows apply to widowers.--All provisions of the law relating to wills and to estates of deceased persons made in regard to the widow of a deceased husband, shall be applicable to the surviving husband of a deceased wife. (Tr. 25)

Second, that even if Sec. 29-1-22 doesn't apply, Sec. 29-1-15 should en-

able inheritance by heirs of a pre-deceased husband. Otherwise, Sec. 29-1-15 is unconstitutional under the Fourteenth Amendment of the United States Constitution as a denial of equal protection of the law. (Tr. 26)

After hearing, the court granted appellee's motion to dismiss appellant's petition, holding that appellant was not an heir of the deceased. (Tr. 16) The court's reason for so holding was that "Laws of 1927, Chapter 163, Section 1" had been repealed in 1943. It provided "...that where a widow died intestate holding community property previously belonging to her and her husband that such property in the event of no children descended one-half to her heirs and one-half to the husband's heirs..." (Tr. 37) The Court held that "...repeal

of this statute...definitely indicates a legislative intent to abandon the practice of having community property descend to one spouse and then revert to the heirs of both spouses." (Tr. 37)

On appeal to the Supreme Court, the appellant repeated her contention that Sec. 29-1-15 was unconstitutional if not applied to the heirs of a predeceased husband as in the case at bar. Without written opinion the Supreme Court affirmed the district court's order granting appellee's motion to dismiss appellant's petition because appellant was not an heir of the decedent, Elizabeth J. Brooks.

THE QUESTION IS SUBSTANTIAL

The question raised in this appeal is substantial because the New Mexico statute discriminates against the heirs

of males in violation of equal protection of the law mandated by the Fourteenth Amendment to the Constitution of the United States. Heirs of a husband are ineligible for inheritance due only to the sex of their ancestor.

This court in Frontiero v. Richardson, 411 U.S. 677, 36 L.Ed. 2d 583, 93 S.Ct. 1764 (1974) held unconstitutional a federal statute providing unequal salaries for service members based on sex. In doing so this court stated that "Classifications based upon sex, like classifications based upon race...are inherently suspect, and must therefore be subject to close judicial scrutiny..."

As in Frontiero there is no valid reason that can be propounded for unequal treatment merely on the basis of sex. There is no valid reason why the

heirs of a deceased wife can inherit and the heirs of a deceased husband cannot. Such classification is arbitrary and unreasonable in violation of the Fourteenth Amendment. Stanley v. Illinois, 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972).

CONCLUSION

Since the problem of statutory discrimination because of sex is "...highly suspect" and a matter of current public concern, appellant believes the question presented by this appeal is substantial and that this court should find probable jurisdiction.

Respectfully submitted,

WARREN F. REYNOLDS

Warren F. Reynolds

ATTORNEY FOR APPELLANT,
LUCY ELIZABETH BROOKS
SCHANEFELT

ORDER OF THE DISTRICT COURT OF LEA COUNTY, NEW MEXICO, NEW MEXICO, dated November 14, 1974, in case No. 33,535 (formal parts omitted).

Before N. RANDOLPH REESE, District Judge

CAME ON for consideration Motion to Dismiss Petition of Lucy Elizabeth Brooks Schanefelt, as amended, and the Petitioner being represented by her attorney of record, Warren F. Reynolds, and the Respondent, Joseph R. Paradiso, being represented by his attorney of record, L. George Schubert, and the Court after considering the briefs submitted by the parties and being advised in the premises, finds:

1. It has jurisdiction of the parties hereto and the subject matter hereof.

2. That Petitioners are not heirs of Elizabeth J. Brooks, deceased, and such Petition, as amended, should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, By the Court, that the Petitioners be and [sic] such Petition and Amended Petition are hereby dismissed with prejudice.

/s/ N. Randolph Reese
District Judge

APPROVED AS TO FORM:

/s/ Warren F. Reynolds
Attorney for Petitioner

OPINION OF THE SUPREME COURT OF NEW MEXICO, dated October 21, 1975, in case 10312 (formal parts omitted).

Before McMANUS, JR., Chief Justice, OMAN, Justice and SOSA, JR., Justice.

WHEREAS, the above entitled cause having been heregofore [sic] submitted for decision, the cause now being ready for final disposition and the Court being sufficiently advised, Mr. Chief Justice McManus, Mr. Justice Oman and Mr. Justice Sosa concurring;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the judgment of the District Court of the Fifth Judicial District in and for the County of Lea, wherein this cause originated and by which Court said judgment was entered, be and the same is

hereby affirmed, and the cause is remanded to the aforesaid District Court.

/s/ John B. McManus, Jr.
Chief Justice

WE CONCUR:

/s/ LaFel E. Oman
Justice

/s/ Dan Sosa, Jr.
Justice

Dated: October 21, 1975

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, dated January 16, 1976 in case 10312 (formal parts omitted).

Notice is hereby given that Lucy Elizabeth Brooks Schanefelt, the Petitioner-Appellant above named, hereby appeals to the Supreme Court of the United States from the Final Judgment of the Supreme Court of New Mexico entered on October 21, 1975, affirming the Judgment and Order of the lower court entered on November 17, 1974, dismissing the Petitioner-Appellant's petition to set aside the decedent's will herein.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

/s/ Warren F. Reynolds

Attorney for Lucy Elizabeth Brooks Schanefelt

Proof of Service

I, Warren F. Reynolds, the attorney for Lucy Elizabeth Brooks Schanefelt, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 16, 1976, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on opposing party thereto, Joseph R. Paradiso, appellee, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to L. George Schubert, Esq., Attorney for Joseph R. Paradiso, P. O. Box 796, Hobbs, New Mexico 88240.

/s/ Warren F. Reynolds

Attorney for Lucy Elizabeth Brooks Schanefelt

FILED IN THE SUPREME COURT OF THE STATE OF NEW MEXICO ON JANUARY 16, 1976.

/s/ Warren F. Reynolds

PROOF OF SERVICE

I, Warren F. Reynolds, the attorney for Lucy Elizabeth Brooks Schanefelt, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 24, 1976, I served a copy of the foregoing corrected Jurisdictional Statement on opposing party thereto, Joseph R. Paradiso, appellee, by mailing a copy in a duly addressed envelope, with first class postage prepaid to L. George Schubert, Esq., Attorney for Joseph R. Paradiso, P. O. Box 796, Hobbs, New Mexico 88240.

Warren F. Reynolds

ATTORNEY FOR LUCY
ELIZABETH BROOKS
SCHANEFELT

Post Office Box 638
Hobbs, New Mexico 88240

PROOF OF SERVICE

I, Warren F. Reynolds, the attorney for Lucy Elizabeth Brooks Schanefelt, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 16, 1976, I served a copy of a Jurisdictional Statement on opposing party thereto, Joseph R. Paradiso, appellee, by mailing a copy in a duly addressed envelope, with first class postage prepaid to L. George Schubert, Esq., Attorney for Joseph R. Paradiso, P. O. Box 796, Hobbs, New Mexico 88240.

Warren F. Reynolds

ATTORNEY FOR LUCY
ELIZABETH BROOKS
SCHANEFELT

Post Office Box 638
Hobbs, New Mexico 88240

Supreme Court, U.S.
FILED
MAY 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1079

LUCY ELIZABETH BROOKS SCHANEFELT
Appellant,

v.

JOSEPH R. PARADISO,
Appellee,

MOTION TO DISMISS OR AFFIRM

C. J. HEAD
Eleven Broadway
New York, New York 10004
Counsel for Appellee
Joseph R. Paradiso

INDEX

	Page
Motion to Dismiss or Affirm	1
The Statute Involved and the Question Presented	1
The Proceedings Below	2
Argument	
This Appeal Presents No Substantial Federal Question And Should Be Dismissed Or, In The Alternative, The Judgment Below Should Be Affirmed	4
A. New Mexico's statutory scheme for the descent and distribution of property left by its deceased domiciliaries is entitled to great deference under this Court's decisions	4
B. The New Mexico statutory scheme for inheritance of property does not violate the Equal Protection Clause	8
C. Other factors demonstrate that this case does not present a substantial federal question and that further argument is not necessary	11
Conclusion	14
Appendix A	A-1

CITATIONS

	Page(s)
CASES:	
In Re Gossett's Estate, 46 N.M. 344, 129 P.2d 56 (1942)	5,6
Forbush v. *Wallace,* 341 F. Supp. 217 (M.D. Ala. 1971), aff'd 405 U.S. 970 (1972)	11
Williams v. *McNair,* 316 F. Supp. 134 (D.S.C. 1970), aff'd 401 U.S. 951 (1971)	11
Harlan v. *Sparks,* 125 F.2d 502 (10th Cir. 1942)	7
Adkins v. *Childrens' Hospital,* 261 U.S. 525 (1923).	10
Frontiero v. *Richardson,* 411 U.S. 677 (1974)	8,9,10,11
Goesaert v. *Cleary,* 335 U.S. 464 (1948)	10
Harris v. *Zion's Savings Bank & Trust Co.,* 317 U.S. 447 (1943)	4
Hoyt v. *Florida,* 368 U.S. 57 (1961)	10
Labine v. *Vincent,* 401 U.S. 532 (1971)	4,5,6,7,9,11
Kahn v. *Shevin,* 416 U.S. 351 (1974)	10,11
Mager v. *Grima,* 8 How. 490 (1850)	4
McDonald v. *Board of Election,* 394 U.S. 802 (1969)	11
Muller v. *Oregon,* 208 U.S. 412 (1908)	10
Radice v. *New York,* 264 U.S. 292 (1924)	10
Reed v. *Reed,* 404 U.S. 71 (1971)	8,9,10,11,13
Rice v. *Sioux City Cemetery,* 349 U.S. 70 (1955)	12
Rudolph v. *U.S.,* 370 U.S. 269 (1962)	12
Schlesinger v. *Ballard,* 419 U.S. 498 (1975)	9,10,11
Stanley v. *Illinois,* 405 U.S. 645 (1972)	8,9,10
Stanton v. *Stanton,* 421 U.S. 7 (1975)	13
United States v. *Burnison,* 339 U.S. 87 (1950)	4
United States v. *Fox,* 94 U.S. 315 (1876)	4
Weber v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972)	5
West Coast Hotel Co. v. *Parrish,* 300 U.S. 379 (1937)	10

STATUTES:	
Section 1, Fourteenth Amendment, United States Constitution (Equal Protection Clause)	2,8,9,10
NEW MEXICO STATUTES:	
New Mexico Statutes Annotated, 1953 Compilation Secs. 29-1-1 through 29-1-23 (Appendix A)	A1-6
Sec. 29-1-8	6,7
Sec. 29-1-9	6
Sec. 29-1-13	6
Sec. 29-1-14	6
Sec. 29-1-15	1,3,5,6,7,8,11,12,13
Laws of 1927, Chapter 163, Section 1	7
Section 1417, New Mexico Consol. Laws 1884	13
MISCELLANEOUS:	
de Funiak, *Principles of Community Property,* Vol 1, § 53 (1943)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1079

LUCY ELIZABETH BROOKS SCHANEFELT,

Appellant,

v.

JOSEPH R. PARADISO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of New Mexico, on the ground that the appeal does not present a substantial federal question.

THE STATUTE INVOLVED AND THE QUESTION PRESENTED

The statute whose validity is challenged in this appeal is Section 29-1-15, New Mexico Statutes Annotated, 1953 (hereafter "N.M.S.A., 1953"), which provides that in the event heirs

of a husband dying intestate are not found as provided in other sections of the New Mexico statutes dealing with descent and distribution, "the portion uninherited shall go to the heirs of the wife of the intestate if dead, according to like rules."[1] This appeal presents the question whether the limitation of this section to "heirs of the wife" results in an impermissible sex-based discrimination as to "the heirs of the husband", as Appellant claims to be, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[2]

THE PROCEEDINGS BELOW

Elizabeth J. Brooks, who resided and was domiciled in Hobbs, New Mexico, died March 27, 1973. She left a will naming Appellee, who was not related to her, as her sole devisee and legatee and as her executor (Tr. 1). Following transfer of Appellee's Petition for Probate of Will from the Probate Court of Lea County, New Mexico to the New Mexico District Court for Lea County (Tr. 4-5), the State of New Mexico filed its protest to the admission of the will to probate on the grounds that the "Decedent did not have the mental capacity to make a will" and that the will was the "result of Petitioner's [Appellee's] exercising of undue influence and fraud upon decedent." (Tr. 6). The issues presented by the petition and protest were tried before a jury, which rendered a verdict that the will was valid. Accordingly, on April 15, 1974 the will was admitted to probate, and Appellee was appointed executor of Mrs. Brooks' estate. (Tr. 7)

Elizabeth J. Brooks had no children, no heirs by adoption and no relatives by consanquinity. She had, however, been

---

[1] The complete texts of Section 29-1-15 and other related sections of the New Mexico statutes are set forth in Appendix A to this Motion.

[2] As set forth on page 5 of Appellant's Jurisdictional Statement, the question presented by this appeal is stated to be whether:

> "Equal protection of the laws provided by the Fourteenth Amendment to the Constitution of the United States requires application of 53 N.M.S.A., Sec. 29-1-15 to heirs of deceased husbands as well as to heirs of deceased wives."

married to Frank J. Brooks, who predeceased her. Alleging that she was the daughter of Frederick Shelby Brooks, a brother of Frank J. Brooks, Appellant in September, 1974 filed a petition in the New Mexico District Court, Lea County, seeking revocation of the probate of Mrs. Brooks' will and the Letters Testamentary issued to Appellee and seeking appointment of Appellant as Administratrix of Mrs. Brooks' estate, on the same grounds as had been advanced by the State of New Mexico in its protest to the probate of Mrs. Brooks' will. (Tr. 12). In paragraph IX of her amended petition[3] Appellant claimed that as a relative by consanquinity to Frank J. Brooks in the collateral line, she was, under Section 29-1-15 N.M.S.A., 1953 "entitled to inherit as an heir of the deceased spouse of the intestate decedent." (Tr. 12).

Appellee moved to dismiss Appellant's petition on the ground that Appellant was not an heir of Elizabeth J. Brooks and, therefore, was not entitled to challenge the validity of Mrs. Brooks' will. In opposing Appellee's motion before the District Court Appellant argued that if Section 29-1-15 were construed to "restrict the inheritance to only heirs of the wife, heirs of a husband would be ineligible for inheritance due only to the sex of their ancestor" and that such a sex discrimination would violate the Equal Protection Clause. (Tr. 26-27). By an order filed November 14, 1974 the District Court dismissed Appellant's petition, finding that Appellant was not an heir of Elizabeth J. Brooks. (Tr. 16). While the District Court wrote no opinion, it had earlier, by letter dated October 31, 1974 to counsel for both parties, explained its reasoning thusly:

> "From 1927 to 1943 New Mexico had a law providing that where a widow died intestate holding community property previously belonging to her and her husband that such property in the event of no children descended one-half to

---

[3] Appellant's initial petition was amended to allege that Appellant's brother, Perry Hershey Brooks, and a nephew, Federick Harrison Brooks, a living son of Appellant's deceased brother, Langley Harrison Brooks, were also entitled to inherit as heirs of the deceased spouse of Mrs. Brooks (Tr. 10; 15). Perry Hershey Brooks and Frederick Harrison Brooks were not parties to the proceedings below and are not parties in this Appeal.

her heirs and one-half to the husband's heirs. The repeal of this statute, which was Laws of 1927, Chapter 163, Section 1, definitely indicates a legislative intent to abandon the practice of having community property descend to one spouse and then revert to the heirs of both spouses." (Tr. 37).

In her appeal to the New Mexico Supreme Court Appellant again asserted her Equal Protection claims. The New Mexico Supreme Court affirmed the District Court without opinion. (Appellant's Brief, Appendix 101-102). This appeal followed.

ARGUMENT

THIS APPEAL PRESENTS NO SUBSTANITAL FEDERAL QUESTION AND SHOULD BE DISMISSED OR, IN THE ALTERNATIVE, THE JUDGMENT BELOW SHOULD BE AFFIRMED.

A. New Mexico's statutory scheme for the descent and distribution of property left by its deceased domiciliaries is entitled to great deference under this Court's decisions.

For more than 100 years this Court has consistently held that the disposition of property within its borders, whether intervivos, testamentary or by intestacy or any other mode, is a matter of state law and not a matter "placed under the control of Federal authority." *United Sates* v. *Fox,* 94 U.S. 315, 320-1 (1876); *Mager* v. *Grima* 8 How. 490, 493 (1850). Consistent with this principle, the Court has stressed that "the settlement and distribution of decedent's estates and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law. . ." *Harris* v. *Zion's Savings Bank & Trust Co.,* 317 U.S. 447, 450 (1943). See also *United States* v. *Burnison,* 339 U.S. 87, 91-2 (1950).

Only recently the Court has had occasion to reaffirm these long-established principles in a case of particular application here. In *Labine* v. *Vincent,* 401 U.S. 532 (1971), the Court rejected a challenge under the Equal Protection Clause to a

Louisiana statute that denied an illegitimate daughter the right to inherit from her father who died intestate leaving only collateral heirs. Noting that Louisiana law regulated many of the property rights incident to family life and that Louisiana had a complex set of rules regarding the rights of illegitimate children, and that some of these rules discriminated in favor of some relations over others, the Court stated:

> "Some of these discriminatory choices are perhaps more closely connected to our conceptions of social justice or the ways in which most dying men wish to dispose of their property than the Louisiana rules governing illegitimate children. It may be possible that some of these choices are more 'rational' than the choices inherent in Louisiana's categories of illegitimates. But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State." 401 U.S. 532, at 538.

See also *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 170 (1972).

New Mexico, too, has a comprehensive body of law regulating property rights incident to family life. A "community property" state, this law has deep and ancient roots, deriving many of its principles from Spanish law, see de Funiak, *Principles of Community Property,* Vol. 1, §53 (1943), and from other states long prior to the time New Mexico became a state. See *In re Gossett's Estate,* 46 N.M. 344, 129 P. 2d 56, 58 (1942). Included in this law is a comprehensive program dealing with descent and distribution, defining family relationships and providing for the inheritance of property. Art. 1, Chap. 29, N.M.S.A. 1953.[4]

Appellant would have the Court ignore this comprehensive body of law and focus on a single section, Section 29-1-15. This

---

[4] The text of Article 1, §§29-1-1 through §29-1-23, as in effect at the time of Mrs. Brooks' death, is set forth in Appendix A.

section cannot be viewed in isolation, however, for as the New Mexico Supreme Court stated in *Gossett's Estate, supra,* these statutes "are in pari materia and should be construed together." 129 P. 2d 56, 58. So construed, it is evident that to the extent heirs of a wife are preferred under certain circumstances to the exclusion of heirs of a husband, such a preference is a permissible regulation by New Mexico of the inheritance of property of its domiciliaries.

Thus, Section 29-1-8 provides generally that "[U]pon the death of the wife, the entire community property, without administration, belongs to the surviving husband." Section 29-1-9, on the other hand, provides that "[U]pon the death of the husband one-half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes one-fourth to the surviving wife and the remainder in equal shares to the children of the decedent and further as provided by law." Two important conclusions may be drawn from these contrasting provisions. One is that had Frank J. Brooks been of a mind to do so, he could have provided for his heirs, including Appellant, leaving them up to one-half of the community property belonging to him and Elizabeth J. Brooks. Whether he did so does not appear from the record, but his opportunity to do so is no less important here than was the fact that the father in *Labine* v. *Vincent, supra,* had various opportunities open to him to provide for his illegitimate daughter even though he did not avail himself of them. 401 U.S. 532, 539.

The second conclusion is that if Section 29-1-15 were thought to work an impermissible sex-based discrimination against heirs of a deceased husband, surely Sections 29-1-8 and 29-1-9 work an even greater such discrimination against a wife and, ultimately, against her heirs. Indeed, throughout New Mexico's statutory scheme for descent and distribution there is preference for the heirs of the husband over those of the wife. Sections 29-1-13 and 29-1-14, for example, provide that if a

wife predeceases her husband and the couple die childless, the entire estate (including the wife's share of community property received by the husband by virtue of Section 29-1-8) goes to the husband's heirs, and none goes to the wife's heirs. Only if the husband has no heirs are heirs of the predeceased wife entitled to inherit from the intestate husband under Section 29-1-15. Clearly, in decrying an alleged neglect of the husband's heirs, Appellant is off base.

Appellant's challenge, in effect, is to the lack of symmetry in the New Mexico statutory scheme. The occasion for this lack of symmetry, at least as to community property, is mentioned in the District Court's letter of October 31, 1974 (Tr. 37). The District Court noted that in repealing Laws of 1927, Chapter 163, Section 1, the New Mexico legislature had evidenced "a legislative intent to abandon the practice of having community property descend to one spouse and then revert to the heirs of both spouses." Undoubtedly, this intent was formed as a result of the decision in *Harlan* v. *Sparks,* 125 F.2d 502 (10th Cir. 1942). In that case a husband and wife owned certain land as community property. The husband predeceased his wife, leaving his share of the property to his wife by will. On the wife's subsequent death, as the couple had had no children, and as the husband's parents had predeceased him, the husband's surviving sister, nieces and nephews were held to have become statutory or "forced" heirs who were entitled to a five-twelfths interest in the land and revenues derived from it.

Appellant would have this Court reimpose a scheme of distribution long ago rejected by the New Mexico legislature. It may well be, as this Court noted in *Labine* v. *Vincent, supra,* that New Mexico's policy cannot be said to be a perfect or even a desirable solution or the one that the Court would have provided for the inheritance of property from a woman whose husband has predeceased her. But like *Labine,* neither can the Court say that New Mexico "does not have the power to make laws for the distribution of property left within the State," and "there is nothing in the vague generalities of the Equal Protec-

tion [Clause] ... which empowers this Court to nullify the deliberate choice of the elected representatives of the people of" New Mexico. 401 U.S. 532, 539.

B. The New Mexico statutory scheme for inheritance of property does not violate the Equal Protection Clause.

Appellant's effort to supplant New Mexico's scheme for the inheritance of property left by a wife dying intestate after her husband rests on the theory that the limited focus of Section 29-1-15 works an invidious and unlawful discrimination based solely on sex, in violation of the Equal Protection Clause. Her Jurisdictional Statement cites only two cases in support of her theory, *Frontiero* v. *Richardson,* 411 U.S. 677 (1974), and *Stanley* v. *Illinois,* 405 U.S. 645 (1972). Neither is helpful to Appellant's cause.

In *Frontiero* the challenged federal statute provided the wife of a male serviceman with dependents' benefits, but afforded such benefits to the husband of a servicewoman only if he proved that the wife had supplied more than one-half of the husband's support. Finding that such different treatment was accorded for the sole purpose of achieving administrative convenience, and in reliance on the Court's decision in *Reed* v. *Reed,* 404 U.S. 71 (1971), the Court concluded that the statute violated the right to equal protection of the law secured by the Fifth Amendment. In *Stanley* the Court held that an Illinois statute that denied to an unwed father a hearing on his fitness as a parent, but granted such a hearing to all other parents whose custody of children was challenged by the State, was invalid under the Equal Protection Clause.

In *Reed* the Court held that the mandatory provisions of the Idaho probate code giving preference to men over women when persons of the same entitlement class applied for appointment as administrators of decedents' estates violated the Equal Protection Clause. Noting that while the Idaho statute preferred males, it did not deny letters of administration to women,

and that a large portion of estates in the United States were administered by women, the Court rejected the notion, relied on by the Idaho Supreme Court, that the avoidance of hearings as to the qualifications of competing applicants for letters of administration justified preference of one sex over another. The Court characterized this as "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . .". 404 U.S. 71, 76.

While it is true, as Appellant notes at page 11 of her Jurisdictional Statement, that this Court in *Frontiero* agreed with the contention of the appellants there that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny", 411 U.S. 677, 682, the *Frontiero* case has no relevance to this cause. As the Court noted in *Schlesinger* v. *Ballard,* 419 U.S. 498, 507-510 (1975), both *Frontiero* and *Reed* involved overbroad generalizations about differences between the sexes based on administrative convenience and that alone.

It cannot be said that the New Mexico statute challenged by Appellant is one based on administrative convenience. It is rather one segment of a legislative effort to strike some balance as between the rights of heirs of a wife whose husband has predeceased her and the heirs of a husband. Given the considerable latitude permitted state legislatures in regulating the disposition of property upon death, as evidenced by the Court in *Labine* v. *Vincent* and the other cases cited at pages 4 and 5 of this motion, that effort is entitled to this Court's respect and neither *Frontiero* nor *Reed* suggest otherwise.

Nor does the Court's decision in *Stanley* aid Appellant. Given the preferred position that matters of family concern have occupied in the United States and in this Court's decisions, an effort to deprive an unwed father of custody of a child merely because of his unwed status, when all other parents whose custody was challenged were accorded a hearing as to their parental fitness, could hardly meet the mandate of the

Equal Protection Clause. But the alleged deprivation complained of by Appellant cannot rise to the dignity of that complained of by the father in *Stanley.*

Appellant's limited reliance on *Frontiero* and *Stanley* ignores the context in which those and other cases dealing with sex-based classifications have arisen. This Court's efforts to balance the competing considerations that come into play in any such legislative classification are hardly new. Almost seventy years ago, in *Muller* v. *Oregon,* 208 U.S. 412 (1908), this Court upheld an Oregon statute providing that females shall not work in certain establishments more than ten hours a day, as against claims that such a limitation violated the Equal Protection Clause. See also *Radice* v. *New York,* 264 U.S. 292 (1924).

Thirty years later, in *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379 (1937), this Court overruled *Adkins* v. *Childrens' Hospital,* 261 U.S. 525 (1923), and upheld a Washington statute providing for minimum wages for women even though it did not extend to men. Later, in *Goesaert* v. *Cleary,* 335 U.S. 464 (1948), the Court upheld, as against an Equal Protection challenge, a Michigan statute forbidding a female to act as a bartender unless she was the wife or daughter of a male owner of a liquor establishment. Finally, in *Hoyt* v. *Florida,* 368 U.S. 57 (1961), the Court upheld a Florida statute making jury duty voluntary for women and compulsory for men.

Frontiero, Reed and *Stanley* do not represent a retreat from the principles of these cases, and they cannot be construed as a complete rejection of any classification that is based on sex or, as here, on a classification that is not based on sex *per se,* but on the status of particular individuals who, by virtue of that status are of a particular sex. Indeed, several of this Court's decisions since *Reed* have upheld a variety of differences in treatment of the sexes against challenges under the Equal Protection Clause. In *Schlesinger* v. *Ballard, supra,* at page 9, the Court upheld different mandatory retirement ages for men and women naval

officers, while *Kahn* v. *Shevin,* 416 U.S. 351 (1974) the Court upheld a Florida statute granting widows a $500 annual property tax exemption not granted to men. Similarly, in *Forbush* v. *Wallace,* 341 F. Supp. 217 (M.D. Ala. 1971), aff'd. 405 U.S. 970 (1972), this Court affirmed, without opinion, the decision of a three-judge District Court upholding an Alabama law requiring women to assume their husband's surnames and to use those surnames in applying for drivers' licenses, while in *Williams* v. *McNair,* 316 F. Supp. 134 (D.S.C. 1970), aff'd 401 U.S. 951 (1971), the Court affirmed, without opinion, the decision of a three-judge District Court sustaining South Carolina's limit of admissions to women in one of that state's eight state-supported colleges.

Labine, Ballard, Kahn, Forbush and *McNair* and the comparable decisions that preceded them are significant for their consistency. Unlike *Reed* and *Frontiero,* where the challenged classifications sought to treat as dissimilar persons whose interests were similar, those cases involved legitimate legislative objectives in the challenged classifications, and the means chosen to accomplish those objectives were found to be reasonable and consistent with the mandate of the Equal Protection Clause.

Section 29-1-15 of N.M.S.A. 1953 is equally consistent with these cases. Construed in *pari materia* with the remaining New Mexico statutes relating to descent and distribution, the cited cases dictate that Appellant's efforts to expand Section 29-1-15 to cover heirs of a deceased husband must fail. See *McDonald* v. *Board of Election,* 394 U.S. 802, 809 (1969).

C. Other factors demonstrate that this case does not present a substantial federal question and that further argument is not necessary.

While the foregoing discussion necessarily focused on New Mexico's statutory provisions in cases of intestacy, it is significant that Elizabeth J. Brooks did leave a will. After a jury trial on the protest of the State of New Mexico, the will was found to

be valid and was admitted to probate, and Letters Testamentary were issued to Appellee. A reversal of the New Mexico Supreme Court at best would only permit Appellant to raise these same issues that have already been decided once after a jury trial.

Moreover, while Appellant suggests that her appeal presents questions of great public significance, its future significance, even to potential heirs situated similarly, is minimal. Shortly after the death of Elizabeth J. Brooks the challenged statute was amended to provide essentially the same treatment for heirs of a deceased husband as Appellant seeks from this Court.[5] Therefore, a decision in Appellant's favor would benefit only her (and possibly Perry Hershey Brooks and Frederick Harrison Brooks; fn. 3 *supra*). This Court has traditionally been reluctant to decide cases of benefit only to the litigants before it. *Rudolph* v. U.S., 370 U.S. 269 (1962); *Rice* v. *Sioux City Cemetery,* 349 U.S. 70 (1955). In *Rice,* after an affirmance of the State Court by an equally divided Court, this Court granted a petition for a rehearing, vacated the judgment of affirmance and dismissed the grant of certiorari as having been improvidently granted. The factor that motivated the Court towards this unusual result was the existence of an Iowa statute (passed after the conduct that gave rise to the Petitioner's challenge) that precluded the question before the Court from rising again.

Further, while Appellant, in effect, seeks an affirmative ruling that Section 29-1-15, N.M.S.A. 1953 includes her as an heir, this Court has recognized that it cannot give relief in

---

[5] As amended, Section 29-1-15 provides:

"29-1-15. *Inheritance by heirs of spouse.* If heirs of the intestate are not found as under section 29-1-14 NMSA 1953, the portion uninherited shall go to the heirs of the deceased spouse of the intestate according to like rules. If the intestate has had more than one deceased spouse the estate shall be equally divided between the heirs of all such spouses, taking by right of representation." (N.M. Laws 1973, ch. 276, §6).

matters of legislative concern and as to which the legislature is free to make choices other than that sought by the litigant before the Court. For example, relying on its decision in *Reed* v. *Reed, supra* at page 8, this Court, in *Stanton* v. *Stanton,* 421 U.S. 7 (1975), declared invalid under the Equal Protection Clause a Utah Statute providing that girls reached majority at age 18 while boys only reached majority at age 21. But the Court recognized that its decision did not finally resolve the controversy, for it was up to the Utah Legislature to determine the age limit to be applied to both males and females.

A decision in Appellant's favor here similarly would not end the controversy. As the determination of who may be heirs of a decedent is a matter for the New Mexico Legislature, it would then be for the New Mexico Legislature to determine what sort of distribution scheme should replace Section 29-1-15, N.M.S.A. 1953.

Finally, the consequences of a decision that Section 29-1-15, N.M.S.A. 1953 includes not only the heirs of the wife of a predeceased husband but the heirs of the husband also would create the very chaos that the New Mexico Legislature sought to avoid in its comprehensive program for the descent and distribution of property upon death. It would create a cloud on all property, real and personal, that has passed by will or intestacy since Section 29-1-15 was passed as Section 1417, New Mexico Consol. Laws 1884. For if Appellant, as an heir of a predeceased husband of Mrs. Brooks, has standing to challenge Mrs. Brooks' will under this statute, there undoubtedly are vast numbers of persons, and their heirs, who, since 1884, might claim similar status. Aside from the quiet title suits, will contests and other litigation that surely could be expected to follow, the detrimental effect on those holding property in New Mexico could be incalculable.

It was to avoid this sort of uncertainty and to secure the prompt and efficient transfer of property from decedents to their heirs and other devisees and legatees that this Court has traditionally accorded the States wide latitude in determining who may inherit property and upon what terms and conditions. This is not a case in which to retreat from those long adhered to principles.

CONCLUSION

WHEREFORE, Appellee respectfully submits that this Appeal does not present a substantial federal question and no further argument is needed; Appellee therefore moves the Court to dismiss the Appeal or, in the alternative, to affirm the judgment of the Supreme Court of the State of New Mexico.

Respectfully submitted,

C. J. HEAD
Eleven Broadway
New York, New York 10004
Counsel for Appellee,
Joseph R. Paradiso

NEW MEXICO STATUTES ANNOTATED, 1953
CHAPTER 29
DESCENT AND DISTRIBUTION

Article 1. Relationships and Division, 29-1-1 to 29-1-23.

ARTICLE I

Relationships and Division

29-1-1. Relationship by consanguinity—Definition—Lines.—The relation of consanguinity being the relation or connection which exists between persons united by the ties of blood shall be considered in the direct and collateral lines, for civil puposes, in the computation thereof.

29-1-2. Direct line—Ascendants and descendants—Degrees.—Relationship in the direct line, counted from fathers to sons and remoter descendants, shall be computed by the number of persons begotten, and these are degrees not counting the trunk: for example, the father is the trunk, the son is the first degree, the grandson the second degree, the second grandson the third degree, the third grandson the fourth degree, the fourth grandson the fifth degree, the fifth grandson the sixth degree, and so on with the rest, and these are called descendants. But from this point, counting upwards they are called ascendants, so the last is called son, in respect to his predecessor, and such predecessor is called father, and going upward, the one [1] that comes next in order is grandfather, second grandfather, third grandfather, fourth grandfather.

29-1-3. Collateral line—Regular and irregular—Degrees.—Relationship in the collateral line in its computation is reckoned by the number of persons begotten, not counting the trunk, to which they are referred as having descended from it, but which are separate laterally, as branches pendant from

that trunk; for example, brothers are of the second degree, because they are two [2] persons, begotten by and descended from the same trunk, or, if the number of brothers be greater, the comparison is always one [1] with another; the sons of these are of the fourth degree, as being four [4] persons separate from each other, but from the same trunk, those that follow are of the sixth degree, and the next of the eighth degree. Therefore, counting in even series, as has been shown, they go on increasing two [2] by two [2] ad infinitum, and this is the regular collateral line. But if, for example, one [1] of the second degree, be considered in reference to one [1] of the fourth degree, this will be the irregular collateral line.

29-1-4. Relationship by affinity.—The relation of affinity is contracted by the union of man and woman in the bonds destined for the propagation of the species, and its computation is in the same order as the relation of consanguinity in respect to the direct line, in descendants and ascendants, and in respect to the collateral line; and it extends only to the eighth degree of civil computation, if the union be by legitimate matrimony, and to the fourth, if the union be without matrimony, it being observed that the man and woman only, who contracted the union, are individually connected by affinity with the blood relations of the other party, and those blood relations are connected by affinity with the consort of their blood parent; and this relationship shall only be valid for the civil purposes which may be explained in the laws and acts of individuals of the human race.

29-1-5. "Division of inheritance" defined.—A division of an inheritance is the distribution of the property inherited among the heirs, giving to each the portion he is entitled to, according to the will of the deceased, or in the manner scribed by law.

29-1-6. Who may demand division of inheritance.—The following persons may demand a division of the inheritance:

FIRST. All and each of the heirs or participators in the inheritance of the deceased, over twenty-two [22] years of age, and capable of managing their property.

SECOND. Minors or incapable persons, such as the insane, idiots and others, through their guardians and protectors, to be appointed by the probate judge if not otherwise provided.

THIRD. The widow of the deceased, although not an heir, in order to recover her acquests during marriage, and other rights to which she may be entitled.

FOURTH. A person pretending to be a participator or heir after having been declared such by law.

FIFTH. A stranger, who, before the division of the property, may have purchased from one [1] of the heirs his portion of the inheritance.

SIXTH. The state treasurer, should he be entitled to receive such inheritance.

29-1-7. Absent heirs.—When any of the heirs are absent, those being present may demand a division of the property, but the judge shall notify the absentee with [within] sufficient time to allow him to express his wishes, and should he not appear in a reasonable period of time, according to the opinion of the administrator or executor, the distribution shall take place, appointing an agent, should none be provided by the absentee, who, on account and risk of his principal, shall take charge of his interests, receiving for his services the compensation the probate judge may deem proper.

29-1-8. Death of wife—Community property.—Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by a judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

29-1-9. Death of husband—Community property.—Upon the death of the husband one-half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes one-fourth to the surviving wife and the remainder in equal shares to the children of the decedent and

further as provided by law. In the case of the dissolution of the community by the death of the husband the entire community property is equally subject to his debts, the family allowance and the charge and expenses of administration.

29-1-10. Inheritance by surviving spouse and children.—Subject to the provisions of sections 18-10 and 18-11 [29-1-8, 29-1-9] of this article when any person having title to any estate, not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeded to and must be distributed subject to the payment of his debts in the following manner: One-fourth thereof to the surviving husband or wife and the remainder in equal shares to the children of decedent and further, as provided by law.

29-1-11. Decedent's exempt personalty goes to widow and remains exempt.—When the decedent leaves a widow, all personal property which in his hands as the head of a family would be exempt from execution, after being inventoried and appraised, shall be set apart to her as her property in her own right, and shall be exempt in her hands as in the hands of the decedent.

29-1-12. Inheritance by heirs of deceased child.—If any one [1] of the childre. of the intestate be dead, the heirs of such child shall inherit his share in accordance with the rules herein prescribed in the same manner as though such child had outlived his parents.

29-1-13. Dying without issue—Inheritance by widow or parents.—If the intestate leave no issue, the whole of his estate shall go to his wife; if he leaves no wife, the portion which would have gone to her shall go to his parents. If one [1] of his parents be dead, the portion which would have gone to such deceased parent, shall to to the surviving parent.

29-1-14. No issue or widow and both parents dead—Inheritance by heirs of parents.—If both parents be dead, the portion which would have fallen to their share, by the above rule, shall be disposed of in the same manner as if they had outlived the intestate, and died in the possession and ownership

of the portion thus falling to their share; and so on through the ascending ancestors and their issue.

29-1-15. Inheritance by heirs of wife.—If heirs are not thus found the portion uninherited shall go to the heirs of the wife of the intestate, if dead, according to like rules, and if he has had more than one [1] wife, who died, it shall be equally divided between the heirs of all such wives, taking by right of representation.

29-1-16. Posthumous children unprovided for by their father's will.—Posthumous children unprovided for by the father's will shall inherit the same interest as though no will had been made. The amount thus allowed to a posthumous child, shall be taken ratably from the interests of heirs, devisees and legatees, but the will for this reason shall not be otherwise revoked.

29-1-17. Inheritance by and from adopted child.—Whenever a child has been legally adopted, such child shall inherit from the adopting parents, and each of them, and the adopting parents and each or either of them shall inherit from the adopted child, to the same extent as if he were a natural child of the adopting parents. For all inheritance purposes without exception the adopted child shall be considered a natural child of the adopting parents and in the event of the death of such adopted child, his estate shall ascend, decend and be distributed as is otherwise provided by law for natural born children of the same family, all to the exclusion of the natural or blood parents of such child, Provided however, where one [1] of the natural parents be united in bonds of matrimony to the other adopting parent then in such event the rules of inheritance as above set out shall attach as if said child were the natural child of both such parents.

29-1-18. Illegitimate child—Inheritance by and from—Evidence of recognition by the father.—Illegitimate children shall inherit from the mother and the mother from the children; they shall inherit from the father whenever they have been recognized by him as his children, in writing, by an instrument signed by the reputed father and must be such as to show upon its face that it was so signed with the intent of recognizing such

children as heirs; Provided, that in event of loss or destruction of such an instrument, declarations of deceased persons shall be admissible to prove such loss or destruction as well as the existence and contents thereof and, whether or not lost or destroyed, and the genuineness of such an instrument, but such declarations shall be corroborated by proof of general and notorious recognition of such children by the father.

29-1-19. Father inheriting from illegitimate child.—Under such circumstances, if the recognition of relationship has been mutual, the father may inherit from his illegitimate children, but in thus inheriting from an illegitimate child, the mother and her heirs take preference of the father and his heirs.

29-1-20. Legitimation by marriage of parents—Illegitimate children become legitimate by the marriage of their parents.

29-1-21. Escheats.—If there be property remaining uninherited, it shall be escheat to the state.

29-1-22. Provisions concerning widows apply to widowers.—All provisions of the law relating to wills and to estates of deceased persons made in regard to the widow of a deceased husband, shall be applicable to the surviving husband of a deceased wife.

29-1-23. Courtesy and dower abolished.—No estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

PROOF OF SERVICE

I, C. J. HEAD, counsel for Joseph R. Paradiso, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on April 29, 1976, I served three copies of the foregoing Motion to Dismiss or Affirm on opposing party thereto, Lucy Elizabeth Brooks Schanefelt, Appellant, by mailing three copies in a duly addressed envelope, with airmail postage prepaid, to Warren F. Reynold, Esq., counsel for Lucy Elizabeth Brooks Schanefelt, Post Office Box 638, Hobbs, New Mexico 88240.

C. J. HEAD
Eleven Broadway
New York, New York 10004
Counsel for Appellee,
Joseph R. Paradiso

Supreme Court, U. S.
FILED
JUN 10 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1079

LUCY ELIZABETH BROOKS SCHANEFELT,
APPELLANT

v.

JOSEPH R. PARADISO,
APPELLEE

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO

ANSWER TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

WARREN F. REYNOLDS, ATTORNEY
FOR APPELLANT, LUCY ELIZA-
BETH BROOKS SCHANEFELT

Post Office Box 638
Hobbs, New Mexico 88240

C. J. HEAD, ATTORNEY FOR
APPELLEE, JOSEPH R.
PARADISO

Eleven Broadway
New York, New York 10004

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1079

LUCY ELIZABETH BROOKS SCHANEFELT,
APPELLANT

v.

JOSEPH R. PARADISO,
APPELLEE

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO

ANSWER TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

WARREN F. REYNOLDS
P. O. BOX 638
Hobbs, New Mexico
88240
ATTORNEY FOR
APPELLANT

DATE: June 3, 1976

INDEX

PAGE

Argument
Reply to Appellee's Point A

A. 53 N.M.S.A., Sec. 29-1-15 cannot supercede the rights of an individual guaranteed by the Equal Protection Clause of the Fourteenth Amendment.....1

Reply to Appellee's Point B

B. 53 N.M.S.A., Sec. 29-1-15 violates the Equal Protection Clause.....10

Reply to Appellee's Point C

C. This case presents a substantial federal question.....14

Conclusion.....17

TABLE OF AUTHORITIES CITED

CASES

Frontiero v. Richardson, 411 US 677 (1973).....10

Kahn v. Shevin, 416 US 351 (1974).....11

Labine v. Vincent, 401 US 532 (1971).....2,3,4,5

Mager v. Grima, 8 How 490, 493 (1850).....1

PAGE

Reed v. Reed, 404 US 71 (1971).....12,13

Schlesinger v. Ballard, 419 US 498 1975).....11

Stanley v. Illinois, 405 US 645 (1972).....10

United States v. Fox, 94 US 315, 320-1 (1876).....1

Weber v. Aetna Casualty & Surety Co., 406 US 164, 170 (1972).....4,5,6

Forbush v. Wallace, 341 F Supp 217 (M.D. Ala. 1971), aff'd 405 US 970 (1972).....11

Williams v. McNair, 316 F Supp (134 (D.S.C. 1970) aff'd 405 US 970 (1972).....11

Beals v. Ares, 25 NM 459, 185 P 780 (1919).....6,13

Harrison v. Harrison, 21 NM 372, 155 P 356 (1916).....9

In Re Gossett, 46 NM 344, 129 P 2d 56 (1942).....7

UNITED STATES CONSTITUTION

Fourteenth Amendment.2,3,4,5,12,13,16,17

NEW MEXICO STATUTES

53 N.M.S.A., Sec. 29-1-8.....7,8

53 N.M.S.A., Sec. 29-1-9.....7,8

PAGE

53 N.M.S.A., Sec. 29-1-13.....8

53 N.M.S.A., Sec. 29-1-14.....8

53 N.M.S.A., Sec. 29-1-15....1,7,9,10,11 12,15

53 N.M.S.A., Sec. 30-2-13.....14,15

Laws 1973, Ch. 276 §2.....8

Laws 1973, Ch. 276 §9.....8

ARGUMENT

REPLY TO APPELLEE'S POINT A

A. 53 N.M.S.A., Sec. 29-1-15 cannot supercede the rights of an individual guaranteed by the Equal Protection Clause of the Fourteenth Amendment.

The Statute in question is 53 N.M.S.A., Sec. 29-1-15. It provides for inheritance by heirs of a predeceased wife if the deceased husband has no heirs. By its plain wording and in its previous application, it does not provide for inheritance by heirs of a predeceased husband if the deceased wife has no heirs.

Appellant has no quarrel with the general proposition that the disposition of property within its borders is a matter of state law and not a matter "placed under the control of Federal Authority." United States v. Fox, 94 US 315, 320-1 (1876); Mager v. Grima, 8 How 490, 493 (1850). Appellee set forth the holding

in Labine v. Vincent, 401 US 532 (1971), for the purpose of reaffirming the aforementioned principle. (P. 5, Motion to Dismiss or Affirm)

There, the statute forbade acknowledged illegitimate children the same rights as legitimate children when the father had died intestate. The statute was attacked upon Equal Protection grounds. As to the father's property, all descendants, ascendants, collateral heirs, and the surviving wife had priority over any illegitimate children. Such children only had priority over the state when there were no heirs of the decedent.

The statute was upheld as being valid and not in violation of the Equal Protection or Due Process Clauses. The rationale used to reach such a holding was that the state had plenary power to dispose of property within its borders. Id. at 537.

However, the holding in Labine is distinguished by two events which appellee failed to point out in his Motion to Dismiss or Affirm.

One, the decision in Labine was not a majority decision. Id. at 532. Justice Black expressed the opinion of four judges. Justice Harlan concurred with the majority for two other reasons--one, the Equal Protection Clause could not prohibit enforcement of marital obligations imposed by Louisiana law; two, even if the statute was declared unconstitutional, as the dissent would proclaim, this result would not have an affect on the outcome of the case, because the child was "natural" rather than illegitimate and the father could have provided for her by will. Id. at 540, 541.

With Justice Brennan expressing the minority opinion, Justices Brennan, White,

Douglas and Marshall dissented. The dissent was vigorous and was predicated upon the principle that the Louisiana Statute created an invidious discrimination against illegitimate children which was a violation of the Equal Protection Clause. Id. at 541.

Two, in Weber v. Aetna Casualty & Surety Co., 406 US 164, 170 (1972), the holding in Labine was distinguished when Justice Powell, expressing the views of seven members of the Court, noted that Louisiana had a substantial and legitimate state interest when the Court decided Labine. Justice Powell stated that the legitimate state interest in providing for stability of land titles and in prompt and definitive determination of the valid ownership of property left by decedents was not present in Weber.

In Weber, the Court declared that the Louisiana statute giving Workman's Com-

pensation benefits to the legitimate children of the decedent, while denying them to the illegitimate children, was unconstitutional. The Court stated that there was no legitimate interest in differentiating between legitimate and illegitimate children. The statute was in violation of the Equal Protection Clause. Id. at 176.

These two factors clearly lead to the conclusion that there are questions as to the holding of Labine. It is appellant's position that the holding in Labine has been modified by Weber. The modification, to the effect, that although the state has plenary powers in the regulation and disposition of property within the state, the state's use of such power cannot invidiously discriminate against the rights of an individual in violation of the Equal Protection Clause. Weber, Supra, at 175.

Appellee states that New Mexico is a Community Property state, and is concerned with regulating property rights incident to family life. (P. 5, Motion to Dismiss or Affirm)

Appellant agrees that New Mexico has an interest in its citizens' family relationships. However, it is appellant's position that this intestacy statute in no way furthers the purpose of keeping the family intact after both spouses are dead. Id. The cornerstone of a community property state is in its equality of property rights between the spouses. Beals v. Ares, 25 NM 459, 185 P 780 (1919) The only purpose of this statute appears to be to discriminate between the heirs of the spouses herein involved. The discrimination in this case is based upon a general sexual classification with no rationale or reasonable basis for such classification.

Appellee also urges that 53 N.M.S.A., Sec. 29-1-15 must be construed in pari materia with the other descent and distribution statutes. (P. 6, Motion to Dismiss or Affirm) Appellee cites In Re Gossett, 46 NM 344, 129 P 2d 56 (1942) for the above proposition. Appellant agrees with appellee's interpretation of In Re Gossett, Supra. However, appellant would point out to the Court that In Re Gossett was a New Mexico Supreme Court case deciding the question of whether an illegitimate child qualified as an heir under the pretermitted state statutes. The principle of pari materia was used only to interpret and apply the statute in question and not to decide its constitutionality. Id. at 58.

Appellee takes the position that 53 N.M.S.A., Sec. 29-1-8, giving the husband the entire community property upon the death of the wife, and Sec. 29-1-9,

giving the husband the power of testamentary disposition of half of the community property upon his death works an even greater discrimination upon the wife and her heirs. (P. 6, Motion to Dismiss or Affirm) Appellant, in reply, would state that the New Mexico legislature has remedied the discrimination of the above two statutes. Sec. 29-1-8 was repealed by Laws 1973, Ch. 276, §9. Sec. 29-1-9 was amended by Laws 1973, Ch. 276, §2 to provide that upon the death of one spouse the entire community property goes to the surviving spouse subject to the deceased's power of testamentary disposition over one-half of the community property.

Sec. 29-1-13 and 29-1-14 are also pointed out by Appellee as favoring the husband's heirs when the husband dies, leaving no wife and no issue. (P. 6, Motion to Dismiss or Affirm) However, the statutes in their application

and construction have been applied to both the husband and the wife dying without issue and unmarried. Harrison v. Harrison, 21 NM 372, 155 P 356 (1916). Therefore, if either the husband or wife die without issue and unmarried, the estate will pass to his or her parents, whichever may be the case. There is clearly no discrimination found in these statutes.

Appellee states that the appellant should not be heard to complain because the foregoing statutes favor the husband's heirs over the wife's heirs. Appellant states that because other portions of the intestacy act may be unconstitutional, this does not make the attacked portion any more constitutional. The statutes cited by appellee are not in question in the present case. They have no affect upon the constitutionality of 53 N.M.S.A., Sec. 29-1-15.

Neither appellee nor appellant can attack the cited statutes in the present case. The unconstitutionality of statutes discriminating against the heirs of Elizabeth J. Brooks is no justification for condoning or ignoring the unconstitutionality of the statute in question.

Appellant would further point out that Sec. 29-1-15 has also been amended by the legislature. The legislature, by its amendment, apparently recognized the discrimination against the husband's heirs where the husband predeceased his wife and she later died without heirs.

REPLY TO APPELLEE'S POINT B

B. 53 N.M.S.A., Sec. 29-1-15 violates the Equal Protection clause.

Appellee attacks the cases of Frontiero v. Richardson, 411 US 677 (1973); and Stanley v. Illinois, 405 US 645 (1972) as being not applicable to the case at bar. Appellant disagrees. As noted in the

Jurisdictional Statement, P. 11, the above cases are applicable because they both deal with classifications based upon gender alone where there was no rational or reasonable basis for such a classification.

Appellee also claims that appellant has ignored Ballard, Kahn, Forbush and McNair where sex-based classifications have arisen and have been upheld over equal protection attack. (P. 10, 11, Motion to Dismiss or Affirm) Appellant has not specifically cited these cases because they are not applicable to the case at bar. These cases are significant only because the statute in each case was upheld because the state had a legitimate purpose for the passage of the statute, and the statute was rationally related to that legitimate purpose. In the case at bar, there is no legitimate purpose for 53 N.M.S.A., Sec. 29-1-15, and

if there could be said to be one, the statute does not rationally relate to such a purpose.

In his Motion to Dismiss or Affirm, appellee states that the purpose in enacting Sec. 29-1-15 was to strike a balance as between the rights of heirs of a wife whose husband had predeceased her and the heirs of her husband. (P. 9, Motion to Dismiss or Affirm) However, appellee cites no case law or legislative intent holding that the statute was enacted for that purpose. Even if the state had such a purpose, the statute upon its face, and in application, does not rationally relate to such a purpose.

The case of Reed v. Reed, 404 US 71 (1971) is analogous to the case at bar. In Reed, an Idaho statute that gave preference to a male over a female seeking letters of administration of a decedent's estate was held to violate the Equal

Protection Clause. There was no legitimate state interest for the creation of such a preference. The Court stated that such a dissimilar treatment where men and women were similarly situated could not stand. Id. at 77. The case at bar is analogous to Reed, Supra, for the simple reason that, absent a legitimate state purpose, the husband's heirs, who were similarly situated with the wife's heirs, were treated in a dissimilar fashion.

The statute is also contrary to the overall scheme and purpose of the community property laws of the State of New Mexico. The very purpose being the symmetry of rights that each spouse enjoys, even after life, in his or her property, including, but not limited to, disposition upon death. Beals, Supra, at 790.

The statute serves no purpose other than to invidiously discriminate against

the heirs of a husband, where he has predeceased his spouse and she dies without heirs.

REPLY TO APPELLEE'S POINT C

C. This case presents a substantial federal question.

Appellee states that a reversal of the New Mexico Supreme Court would only permit appellant to raise issues that have already been decided by a jury. (P. 12, Motion to Dismiss or Affirm) However, appellant was never a party to the previous determination of the validity of Elizabeth J. Brooks' will by the jury prior to its admission to probate. 53 N.M.S.A., Sec. 30-2-13 gave appellant standing, if she was an heir, to contest the validity of the will within six (6) months after its admission to probate. However, the New Mexico District Court Judge ruled that appellant was not an heir of Elizabeth J. Brooks. Therefore,

under 53 N.M.S.A., Sec. 30-2-13, appellant had no standing to contest the validity of the will. (R. 16) Such a determination was predicated totally on the language and previous application of 53 N.M.S.A., Sec. 29-1-15, which precluded appellant from being an heir of Elizabeth J. Brooks.

In answer to appellee's contention that a decision in appellant's favor would create chaos to title to property in New Mexico, appellant would rely on 53 N.M.S.A. Sec. 30-2-13 which precludes any actions contesting the validity of wills where property is involved, six (6) months after probate. Furthermore, will contests arising after July 1, 1973, are governed by amendment. 53 N.M.S.A., Sec. 29-1-15, which says the portion of the estate uninherited shall go to the heirs of the deceased spouse of the intestate according to like rules. Thus, the heirs

of the predeceased spouse, husband or wife, whichever the case may be, are treated in a like manner.

The questions presented in this case are of greater public significance than merely the question of whether a decision will be rendered in appellant's favor. This case is concerned with a statute involving a sex-based classification which does or does not violate the Equal Protection Clause. A decision in this case would benefit all litigants who have similar questions regarding the validity of statutes where differences are based upon sex classifications.

Once and for all, the Court must decide whether a state has plenary power to make laws for the disposition of property found therein without regard to the Equal Protection Clause. Questions which deal with the very foundation upon

which the rights of an individual are protected from invidious discriminate state action are substantial and are of the upmost public significance.

CONCLUSION

For the reason that the discrimination is based upon a sex classification, which in this case is in violation of the Equal Protection Clause, and for the foregoing reasons, the appellant believes the Motion to Dismiss or Affirm submitted by the appellee should not be granted.

Respectfully submitted,

WARREN F. REYNOLDS

Warren F. Reynolds

ATTORNEY FOR APPELLANT
LUCY ELIZABETH BROOKS
SCHANEFELT

PROOF OF SERVICE

I, WARREN F. REYNOLDS, counsel for Lucy Elizabeth Brooks Schanefelt, Appellant herein, and a member of the Bar of the Supreme Court of the United States hereby certify that on June 8, 1976, I served three copies of the foregoing Answer to Appellee's Motion to Dismiss or Affirm on opposing party thereto, Joseph R. Paradiso, Appellee, by mailing three copies in a duly addressed envelope, with airmail postage prepaid, to C. J. Head, Esq., counsel for Joseph R. Paradiso, Eleven Broadway, New York, New York 10004.

Warren F. Reynolds

WARREN F. REYNOLDS
P. O. Box 638
Hobbs, New Mexico 88240

COUNSEL FOR APPELLANT
LUCY ELIZABETH BROOKS
SCHANEFELT